IMAC Energy *and* United Mine Workers of America. Cases 10–CA–24730 and 10–CA–24906

November 27, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On May 17, 1991, Administrative Law Judge J. Pargen Robertson issued the attached decision. The Respondent filed exceptions, a supporting brief, and a motion to reopen the record. The General Counsel and the Charging Party filed oppositions to the motion.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record[1] in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, IMAC Energy, Brilliant, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] We deny the Respondent's motion to reopen the record for the purpose of attacking the credibility of witnesses at the hearing. See *Kenai Helicopters*, 235 NLRB 931 (1978). Moreover, we note that the affidavit proffered by the Respondent relates to prehearing events and was given by an individual who was a witness at the hearing. In any event, the proffered evidence would be insufficient to prove the Respondent's claim that discriminatee David Threlkeld fabricated evidence to support his testimony.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Mary Bulls, Esq., for the General Counsel.
Sydney F. Frazier Jr., Esq., of Birmingham, Alabama, for the Respondent.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge. This hearing was held in Birmingham, Alabama, on November 8 and 19 and on December 17, 1990. The charge in Case 10–CA–24730 was filed on April 25 and amended on May 24, 1990. The charge in Case 10–CA–24906 was filed on August 21 and amended on September 27, 1990.

The order consolidating cases and amended complaint issued on October 3 and was amended on November 8, 1990. The complaint alleges that Respondent engaged in several acts in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (Act).

I make the following findings on the basis of the entire record, my observation of the demeanor of witnesses, and after consideration of briefs filed by Respondent and General Counsel.

Respondent admitted that it is an Alabama corporation engaged in the production of coal with places of business in Brilliant and Natural Bridge, Alabama; that during a representative 1-year period it sold and shipped from its Alabama facilities goods valued in excess of $50,000 directly to customers outside Alabama; and that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Respondent admitted that the Charging Party, United Mine Workers of America (UMW) is, and has been at material times, a labor organization within the meaning of Section 2(5) of the Act.

This matter involves a surface mining pit at Brilliant, Alabama, known as Black Creek. Approximately 25 employees worked for Respondent at Black Creek on two 10-hour shifts. They were supervised by Superintendent T. J. Robbins. Respondent's owners, Jack Maturo and President Tim McCoy, were over Robbins. Maturo routinely visited the mine while McCoy did not routinely appear there.

There was evidence of some union activity at Black Creek from August 1989. A union organizing campaign involving United Mine Workers actually started in February 1990 and included an election which the Union lost on April 27, 1990.

General Counsel alleged that Respondent engaged in illegal activity by discharging one employee, interrogating and threatening employees, soliciting names of employees that were supporting the Union, laying off several employees on March 30, 1990, and refusing to reinstate several of those laid-off employees, because of its employees' union activities.

I. THE 8(a)(1) ALLEGATIONS

A. *Superintendent T. J. Robbins*

1. Interrogation

Former employee David Threlkeld testified about a March 19, 1990 conversation he had with Superintendent T. J. Robbins:

> [Robbins] come up to the drill where I was drilling and motioned me to get out of the drill and come get in the truck with him. I done so. And he asked me had I heard anything about an organizing effort, and I told him just rumors.
>
> He said, ''Well, I've heard that 70 percent of the evening shift at Black Creek has already signed cards.''
>
> And he went on to say that Tim said he would get a list of the names of the card signers and he would shut down and reopen and there wouldn't be a card signer working at the new pit.
>
> And then he said that Tim would be having a talk with us in the very near future about it.
>
> . . . .
>
> I asked him about Joe Fuller.
>
> . . . .

> I told him I'd heard Joe Fuller had got fired for the organizing effort. And he told me that. Said that he had.
>
> . . . .
>
> He said he fired him for stirring up union business—or union organizing.

2. Told discharge was because of union activities

Former second-shift employee Jerry Bickerton talked with Respondent's superintendent T. J. Robbins shortly after Joe Fuller was discharged:

> I asked [Robbins] about Joe and everything. You know, he'd been working and out several days and he was back. They said he'd just got fired and I was asking him. He told me Joe had started some union trouble, you know, back sometime earlier and they thought they got it straightened out, and he was pushing the union again and they just couldn't have that. Couldn't put up with it.

As shown above, David Threlkeld testified about a March 19, 1990 conversation he had with T. J. Robbins:

> I told him I'd heard Joe Fuller had got fired for the organizing effort. And he told me that. Said that he had.
>
> . . . .
>
> He said he fired him for stirring up union business—or union organizing.

3. Threatened to close and move mine

As quoted above under the interrogation and threat of discharge sections of this decision, David Threlkeld testified about a March 19, 1990 conversation he had with T. J. Robbins:

> [Robbins] said, ''Well, I've heard that 70 percent of the evening shift at Black Creek has already signed cards.''
>
> And he went on to say that Tim said he would get a list of the names of the card signers and he would shut down and reopen and there wouldn't be a card signer working at the new pit.

T. J. Robbins denied making the above statements.

I find that the testimony of T. J. Robbins was not credible. Robbins denied that he heard anything about the Union between the picketing over the Pittston strike during the summer of 1989 and the filing of the petition by Respondent's employees in April 1991. That testimony is incredible in view of the entire record including the testimony of Respondent's owners Tim McCoy and Jack Maturo. The employees were being contacted by UMW and they were discussing organizing from a time during the Pittston strike through the time of the UMW organizing campaign during the spring of 1990. The union talk even generated comments about the Union during a speech by Tim McCoy to the employees on March 21, 1990.

As to the testimony of Bickerton and Threlkeld, I was impressed with the demeanor of both. To a large extent both Bickerton and Threlkeld were corroborated by other testimony.

There was evidence which called Threlkeld's testimony into question. During his earliest prehearing affidavit to the National Labor Relations Board (Board or NLRB), Threlkeld did not include any reference to comments by Robbins about 70 percent of the second shift signing union cards. That was included in a subsequent affidavit after Threlkeld was admittedly interviewed by the union representative about the strength of the Union's evidence regarding the March 30 layoff.

Reference to the rumor comment by Robbins was included in Threlkeld's diary as the last comment under March 19 in the diary and that comment could have been added at a later date without disturbing anything else in the diary. However, it is not evident from an examination of the diary that the comment was added later. The note dated 3–19–90 in Threlkeld's diary reads:

> T.J. came up to drill. Asked me had I heard about union making effort to organize. T.J. said Tim M. said he would not operate a union mine. Tim said that if it came to vote he would get a list of names that signed cards and he would shut down and then when he opened up somewhere else that there would be none of the card signers at that mine. I asked TJ had he heard that Joe Fuller was fired for that reason and he said that was what had happened. He said Jack said that Joe got all the union mess started. TJ told me Tim was going to have a talk with us about the union. He said rumor was 70% of 2nd shift had signed cards.

Threlkeld's testimony regarding his interview with the union representative was corroborated. UMW Representative Sidney Hill testified that in an interview with Threlkeld he saw Threlkeld's notebook which included a statement that T. J. Robbins said there was a rumor that 70 percent of the second shift had signed union cards.

Respondent pointed out the significance of Sidney Hill's testimony in arguing that Threlkeld and Hill collaborated in producing that additional evidence in support of the Union's claim that the layoff was illegal. The record does show that in order for Threlkeld's diary to contain fabrication made during or after his interview with Hill, Hill would have to have been aware of that fabrication.

In fact such a collaboration would have included more than Hill and Threlkeld. The meeting in which the 70-percent comment was allegedly discovered was also attended by Ed Fair, Jerry Bickerton, and Joe Fuller. If there had been collaboration it would have had to include those five people. I cannot find such collaboration absent some evidence.

The evidence does not support a finding that there was collaboration to falsify evidence. Only Hill and Threlkeld were asked about that meeting but the others named were available at the hearing and testified about other matters. Hill's and Threlkeld's testimony were similar. Neither said anything which demonstrated collusion to falsify evidence.

Respondent also argued that Threlkeld's testimony should be discredited because his original affidavit did not include any evidence of illegal motivation for the layoff of the second shift.

Actually Threlkeld's original affidavit included all the matters from his diary notebook regarding his March 19 conversation with Robbins other than the alleged comments by

Robbins about 70 percent of the second shift. Threlkeld's original affidavit included several matters which, if credited, illustrate union animus including an alleged comment by Robbins that Tim McCoy would shut Black Creek down. That comment is relevant to the question of illegal motivation even though there was no direct connection made to the second shift.

Here the testimony of Threlkeld conflicts with the testimony of only one other witness. That particular witness demonstrated that his testimony was unreliable. I cannot credit the testimony of T. J. Robbins because, among other reasons, it appears to conflict with testimony of Co-owner Tim McCoy as well as that of Co-owner Jack Maturo.

McCoy was not regularly at the Black Creek pit. Robbins was there every day supervising the mine even though he did not remain throughout the second shift. McCoy admitted that he was aware that the Black Creek employees were involved in activities by UMW from the summer of 1989 through the NLRB election in April 1990. Robbins, on the other hand, testified that he had no knowledge of any union activity until the petition was filed with the NLRB in April 1990.

The record also shows that Robbins had several conversations with employees regarding UMW. Robbins admitted talking with Bickerton and Threlkeld about the Union even though he denied knowing the employees were engaged in union activity.

In view of the record I am convinced that Robbins' testimony is unreliable. Due to that finding I am unable to use the fact that there are conflicts between Robbins, on the one hand, and Bickerton and Threlkeld on the other, as evidence which tends to call Bickerton's and Threlkeld's testimony into question.

As shown above, Threlkeld's failure to include Robbins' alleged comments about 70 percent of the second shift signing union cards, did call Threlkeld's testimony into question, but I find those questions failed to prove unreliability.

I am convinced that Threlkeld testified truthfully despite his failure to include the 70-percent comment by Robbins in his original affidavit. Therefore I shall credit the testimony of Threlkeld and Jerry Bickerton and, to the extent their testimony conflicts, discredit the testimony of T. J. Robbins.

The credited evidence proved that Robbins interrogated David Threlkeld about the employees' union activities (*Krona 60 Minute Photo*, 277 NLRB 867 (1985); *Rossmore House*, 269 NLRB 1176 (1984); *O. K. Trucking Co.*, 298 NLRB 804 (1990)); he told Bickerton and Threlkeld that Joe Fuller had been discharged because of union activities (*Armour Con-Agra*, 291 NLRB 962 (1988)); and he threatened Threlkeld that Respondent would shut down then reopen the mine and get rid of cardsigners (*Maremont Corp.*, 294 NLRB 11 (1989); *Telex Communications*, 294 NLRB 1136 (1989); *Marshalltown Trowell Co.*, 293 NLRB 693 (1989)). Those actions constitute violations of Section 8(a)(1) of the Act.

B. *Part Owner Jack Maturo*

1. Interrogation and threat of futility

Jerry Bickerton testified that he talked with Part Owner Jack Maturo about 2 weeks before the March 30, 1990 layoff:

> A. [Maturo] was asking me did I know who was pushing the union; who was trying to get cards signed, and all that. And had I heard about the union talk and everything.
>
> I told him, ''Yes. In a non-union pit you're gonna have union talk.''
>
> And he wanted to know if I'd help him try to find out who was stirring up union talk and everything.
>
> Q. What did you tell him?
>
> A. I told him I'd just do what I could and that was it 'cause there hadn't been nobody pushing it on me or nothing like that.
>
> Q. Do you recall anything else Mr. Maturo said during that conversation about the union?
>
> A. Well, he just let me know we had been non-union and that was the way he wanted to keep it. That we wasn't gonna have no union. It was being run non-union and that's the way it was gonna stay.
>
> . . . .
>
> Well, we'd just been told it wouldn't go union. That they had had that problem before and solved it and they would solve it again. We just wouldn't be union.

Former employee Jerry Humphres testified that Jack Maturo approached him a time or two while he was working in the Black Creek pit and asked him if anybody had approached him with a checkoff card.

Jack Maturo admitted asking Jerry Bickerton if the union talk was slowing down production. Maturo denied asking anyone about a list of employees pushing the Union.

2. Solicited names of employees supporting Union

As shown above Jerry Bickerton was questioned by Jack Maturo about 2 weeks before the March 30 layoff. Maturo asked for Bickerton's help to find out who was stirring up union talk.

I find that both Bickerton and Humphres testified truthfully about their conversations with Maturo regarding the Union. Bickerton and Humphres were impressive in their demeanor. Their testimony demonstrates interrogation which is violative of Section 8(a)(1) of the Act. The comments made by Maturo illustrate that he was inquiring about union activities out of concern with union organization rather than, as he testified, out of concern over production. Neither Bickerton nor Humphres were known union advocates at the time of their conversations with Maturo. *Kona 60 Minute Photo*, 277 NLRB 867 (1985); *Rossmore House*, 269 NLRB 1176 (1984); *Tom's Foods*, 287 NLRB 645 (1987).

Bickerton's credited testimony proved that Respondent through its part owner Jack Maturo, solicited its employee to supply it with names of those employees that were helping the Union, in violation of Section 8(a)(1). *O. K. Trucking Co.*, 298 NLRB 804 (1990); *Honeycomb Plastics Corp.*, 279 NLRB 413, 420, 425 (1988). Bickerton's testimony also shows that by telling its employee that Respondent was non-union and that was the way it would stay, Maturo threatened that it would be futile for the employees to select the Union. *F. & P. Meat Co.*, 296 NLRB 759 (1989); *Dorothy Shamrock Coal Co.*, 279 NLRB 1298 (1986); *Cannon Industries*, 291 NLRB 632 (1988).

C. *Part Owner and President Tim McCoy*

The record illustrated that Respondent President Tim McCoy addressed the employees on March 21, 1990.

Jerry Humphres testified that the main thing he recalled of the address by Tim McCoy was that if ''we couldn't work there without the union that [McCoy] would write us a recommendation and the gate was open to leave.''

According to Jerry Bickerton, Tim McCoy called a meeting of employees on March 21, 1990. Bickerton recalled that as only the second such meeting ever called by McCoy. McCoy told the employees that he had heard talk about a union and that he was opposed to the Union. McCoy told the employees that if they weren't satisfied with the way it was that the ''gate was open.''

David Threlkeld recalled that Tim McCoy told the employees during his March 21 speech that he wished that whoever was behind the union organizing would just leave and not tell McCoy anything about it. McCoy said that he would give that employee a job reference.

Edward Fair recalled McCoy telling the employees that Black Creek was a nonunion pit, it was gonna continue being nonunion and if the employees could not work nonunion they could leave and maybe find a better job.

In determining credibility I note the following testimony regarding McCoy's March 21 talk with the employees:

Tim McCoy testified:

> [I]n the past we felt like we'd worked through the pickets and crossed picket lines and we'd worked a lot of folks that cared about the jobs that they had at IMAC Energy. They cared enough about them to take intimidation and threats and come to work to save the company. And that we were at a point now that we've got to save the company.
>
> . . . .
>
> . . . anyone that works for us, that helps us, we want to help them. And if they can get a better job, I'd like to see them do better because that's the way we would want them to treat us. And we've done that for ten years.
>
> I made the statement that if anyone was unhappy, didn't like the situation—like I just said, didn't like me or Jack—and they didn't want to come talk to us, or talk about it or complain, that I would do what I could do to help them find a better job.
>
> I want to tell everyone here what me and Jack's position is on an issue. And the issue is that we are not in the union, and we are not desirous to be in the union, and it is our desire to continue to operate this company non-union like we have for the past ten years.
>
> . . . that to operate under a union contract would cost this company significantly more than it does the way we operate today. And that if I had to add this cost to our products, the likelihood of selling them would be extremely low.

T. J. Robbins testified in response to whether McCoy said anything about the UMW:

> I remember [McCoy] saying something to the effect that him and Jack has always been non-union and they could not afford to be union with the market of coal they was selling.

Jack Maturo recalled McCoy started the talk with the financial condition of the mine. Later during his talk,

> [McCoy] brought up the fact there was a lot of talk going on as far as unhappy people.
>
> Which there was a lot of talk. Because we had given raises the first of March and there were a lot of people who figured they deserved twice and three times what they got. There was a lot of people unhappy with what they received in the raise instead of being thankful for a raise.
>
> And his statement then regarding those people who had made statements about being unhappy was that as far as he was concerned, those that were not happy, those that were not content with their jobs, the best thing they could do is find other employment.
>
> Because it was probably the worst time we had ever had for giving a raise and being condemned at the same time.

As examination of the above evidence shows that most of the witnesses had similar recall of the March 21 address. As shown above I found Jerry Bickerton and David Threlkeld were credible witnesses. Their testimony along with the testimony of Jerry Humphres and Edward Fair showed that McCoy told his employees that he would prefer they find other employment if they wanted the Union and that he would assist them in finding other employment. The above evidence shows that the testimony of Bickerton, Threlkeld, Humphres, and Fair is somewhat similar to that of McCoy, Robbins, and Maturo. Maturo testified that the unhappiness expressed by the employees stemmed from their dissatisfaction with a recent pay increase. However, McCoy's testimony revealed that although he spoke about employee unhappiness, he did not couple that unhappiness to any particular subject. McCoy admitted that he also talked about the employees' union campaign.

I credit the testimony of Bickerton, Threlkeld, Humphres, and Fair. I find that evidence proved that Tim McCoy told his employees that he would help them find other work if they wanted the Union. That constitutes a violation of Section 8(a)(1) of the Act. *J. & G. Wall Baking Co*., 272 NLRB 1008, 1011 (1984).

II. THE 8(a)(3) ALLEGATIONS

A. *The Discharge of Joe Fuller*

Joe Fuller worked for Respondent at their Black Creek Mine from May 16, 1989, until his discharge in March 1990. Fuller was a rock truckdriver on the first (day) shift. A week before his discharge he was given a 25-cent pay raise which brought his pay to $7.75 per hour.

Fuller engaged in union activity from around August 1989 when he was approached by a man from another employer on behalf of the United Mine Workers of America. From that time Fuller talked to employees and solicited some to sign union cards. He also obtained, and supplied the Union with, a list of employees from Black Creek which had been prepared by his supervisor Bruce Cornelius. After hearing a

rumor that he was going to be fired Fuller stopped his union activity around December 1989.

David Threlkeld testified that shortly before the hunting season started on November 20, 1989, Superintendent T. J. Robbins asked him if he knew anyone that was interested in a job driving a rock truck. Robbins said they had two union troublemakers, Joe Fuller and Greg Burns, as rock truckdrivers and that they were going to get rid of both of them.

Beginning in January 1990, Fuller talked with employee David Threlkeld about the Union. Fuller and Threlkeld met with Tom Wilson from the Union at a cafe. After that Fuller talked to some employees about the Union on the job. He also solicited some employees to sign union cards but all his solicitation occurred off the job.

Fuller was called into the office by Part Owner Jack Maturo. Maturo told Fuller that he was an inefficient driver and that, instead of firing Fuller, he was going to lay him off so that Fuller could ''draw your pennies.''

Fuller was never disciplined because of his work before his termination.

As shown above under the 8(a)(1) caption, Jerry Bickerton testified that Superintendent Robbins told him that Fuller had been discharged because Fuller started some union trouble.

David Threlkeld testified (see above) that T. J. Robbins responded to him on March 19 that Fuller had been fired because of Fuller's union organizing activities.

Findings: The credited evidence illustrated that Fuller was discharged because of his union activities. The evidence showed that Respondent knew of Fuller's union activities from before November 1989. According to Fuller he temporarily stopped his union activities out of fear of discharge during December 1989. Fuller was discharge shortly after he renewed union activities in early 1990. Two employees were told by Respondent's superintendent that Fuller had been fired because of his union activities. T. J. Robbins told Jerry Bickerton that Respondent felt it had straightened out Fuller but that he was pushing the union again. I find that General Counsel proved a prima facie case of discharge.

I also find that Respondent failed to show that Fuller would have been discharged in the absence of protected activities.

Respondent's supervision was unable to settle on a specific cause for Fuller's discharge. Although Superintendent Robbins testified that Fuller was unable to handle any of the jobs he was assigned, Co-owner Maturo testified that Fuller was a good rock truckdriver but was inconsistent.

There was a dispute in the evidence regarding whether Fuller was ever disciplined because of his work. It is not disputed that Fuller never received a written warning. Respondent contends that he was orally warned about his work on numerous occasions. Fuller testified that he only told on occasion that he needed to speed up.

It was Respondent's policy to give three warnings before discharge. The record shows that Fuller was never told that he had received three warnings.

Bruce Cornelius, the leadman that directed Fuller's work, testified as to only one occasion that he felt he reprimanded Fuller:

> Q. Well, were you ever critical of [Fuller's] performance to him directly?
>
> A. One time that I really got onto him like you would say it was really a reprimand.

Immediately before Fuller's discharge he was awarded a 25-cent-per-hour increase in pay. According to Maturo he gave that wage increase because he had promised a pay increase to the employees. All the employees did receive a pay increase of at least 25 cents at that time. Nevertheless, no convincing reason was given as to why Fuller received a pay increase a week before his discharge.

The record proves that Respondent's supervisors gave slightly different reasons for Fuller's discharge; Fuller was granted a 25-cent raise during the week before his discharge; the evidence failed to show that Fuller received three reprimands before his discharge; Respondent's superintendent expressed an intent to discharge Fuller in November because of his union activities shortly before Fuller temporarily stopped his union activities; Respondent's superintendent told two employees that Fuller had been discharged because of his union activities after Fuller renewed those activities; and Fuller was discharged at a the very time that the union organizing had picked up.

In view of the full record including especially the above factors, I find that the record failed to show that Fuller would have been discharged in the absence of his protected activities. (*Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); *Delta Gas*, 283 NLRB 391 (1987), enfd. 840 F.2d 309 (5th Cir. 1988); *Southwire Co. v. NLRB*, 820 F.2d 453 (D.C. Cir. 1987); *Barnard Engineering Co*., 295 NLRB 226 (1989)).

B. *The Layoff*

On March 30, 1990, Respondent laid off eight employees from its second shift at the Black Creek Mine. Charles Alexander, Jerry Bickerton, Ed Fair, William Gray, Jerry Humphres, Titus Smith, and David Threlkeld were laid off on that occasion. Billy Linley was also laid off but Linley was recalled in May 1990. The second (night) shift included a total of 11 employees.

During the hearing five witnesses testified that they were involved in a March 30 layoff of Respondent's second shift at the Black Creek Mine. Jerry Bickerton was dozer operator and leadman on the second shift. Bickerton testified that he was phoned by Jack Maturo on March 30. Maturo told Bickerton that ''he was laying off the night shift because the coal had gotten too deep, the cover was too steep, too much material on top of the coal.'' Maturo went on according to Bickerton, saying that ''they were supposed to get permits for some new land; that it would take about two months when we'd be back working like normal.''

Despite Maturo's comments that the second shift was being laid off and his comments about being back to normal in about 2 months, Bickerton, as well as David Threlkeld, William Gray, Jerry Humphres, and Edward Fair, was advised by letter dated March 31 that he had been terminated and should seek permanent employment elsewhere.

Under examination by General Counsel as an adverse witness Respondent's president Tim McCoy testified that he made the final decision to lay off employees. According to McCoy he started considering that possibility a few weeks

before, and made the final decision a few days before, March 30. McCoy made the decision to lay off because Respondent was not producing enough coal to meet the next payroll. McCoy testified that Black Creek was the only IMAC mine at that time.

According to McCoy he ran into production problems when he encountered some areas where there had been previous underground mining.

Although Respondent checked the area with test holes when it originally decided to mine Black Creek it did not learn that the previous underground mining had been extensive. According to McCoy, he discovered by more exploratory drill holes that the Black Creek operations were getting into a more extensive previously mined area about a month before the operations actually reached that problem. Due to the lag time inherent in such things as securing available lease lands and the requirement of permits from the Alabama Surface Mining Commission, Respondent had to continue working the same area for about 6 months before they could move into other mining areas.

At the same time Respondent encountered the underground mined area on one side of the Black Creek pit, it was encountering an extensive overburden of as much as 125 feet on the other side. According to McCoy he was mining a 26-inch seam below that extensive overburden. McCoy testified that those two problems, the underground mined area and the overburden, caused the production to drop to the point where he could not continue to meet his payroll.

According to McCoy the production in March 1990 was probably 60 to 75 percent of what production should have been and Respondent had to buy coal from other mines to maintain sales and customers. Respondent lost one customer because of that problem.

Respondent offered documentation as follows regarding productions in tons of coal, at the Black Creek mine:

October 1989	12,535
November 1989	13,166
December 1989	13,210
January 1990	14,364
February 1990	11,875
March 1990	10,917
April 1990	8,570
May 1990	9,068
June 1990	8,895
July 1990	9,272
August 1990	15,578
September 1990	12,734

McCoy testified that he took action to generate more revenue by applying for a permit revision and that he took action to stem the flow of money out of the mine by laying off the second shift.

McCoy applied for a permit revision with the Alabama Surface Mining Commission which would allow Respondent to mine in other more productive areas than the one mined at the time of the layoff. McCoy was able to apply for a permit in an increment of the Black Creek area where he had a lease and to also seek to lease some other land. McCoy testified that the permit revision did not come through until May 1990.

Subsequently during the hearing McCoy gave a different light on why he felt Respondent's production of coal at Black Creek fell off during February and March. Under cross-examination by General Counsel after being recalled to the stand as Respondent's first witness, McCoy testified as follows:

> Q. Well, what do you think happened then with respect to—you have the months of October through January, 1990. From October, '89 on your tonnage. Are you attributing that decrease in February and March to the fact that second shift was just kind of doing things their own way?
>
> A. For the most part. Uh-huh.
>
> Q. The coal was there and available to be mined?
>
> A. Oh, yeah.

McCoy had testified that shortly before the layoff he had discovered that the second shift was not being productive due to poor work practices. Superintendent T. J. Robbins supported McCoy through records he maintained from January 26 showing the first shift was more productive than the second during that time period before the layoff. According to Robbins he produced those records by marking and walking off the wall of overburden before each shift. His measurements tended to show the amount of overburden removed by each respective shift.

Jack Maturo testified that he talked to Jerry Bickerton about the productivity of the second shift during March 1990. According to Maturo at that time the second shift ''was not meeting up to standards, and had not been meeting up to standards for quite some time.'' Maturo testified that among other things, he asked Bickerton if ''the union talk also being a problem slowing down production, slowing down our advancement?''

Jerry Bickerton who as shown above, disagreed with Maturo as to the slant of their March conversation, agreed that the overburden at the Black Creek Mine was running from 40 to 120 feet at the time of the layoff. That had caused production to go down. He also agreed that the second shift should be more productive than the first because of some nonproductive duties such as road building which were handled by the first shift. Bickerton was not aware if the first shift was more productive that the second before the layoff. He was aware that Respondent was marking the high wall to determine productivity on each shift during the time before the layoff. Bickerton testified that Respondent started marking the high wall to determine shift production some 2 or 3 months before the layoff.

Bickerton stated however that Respondent did not regularly mark the high wall and that as much as 3 weeks might pass between times when the high wall was marked.

David Threlkeld testified that he was working on the average of 50 hours per week during the year before the layoff. Threlkeld recalled that the overburden was deeper on one end of the pit than on the other and that it was around 130 feet on the deeper end.

According to Threlkeld they were moving quite a bit of coal at the layoff but they were having to go deep for it and they had hit some old mine works. Threlkeld explained that when you hit old mine works that means you have taken off the overburden for nothing because the coal has already been removed.

Jerry Humphres testified that before the layoff he was working alternating 2-week periods with one 2-week period of 50 hours per week then the next 2-week period with 60 hours per week. Humphres' work was not reduced before the layoff.

Bickerton testified that the second shift averaged 50 to 60 hours work per week for a year and a half right up to the layoff. There was no slack in the work and Bickerton had no notice of an impending layoff until March 30.

Former second-shift employee William Gray testified that he was working at least 40 hours a week until the week of the layoff when he was told by the leadman that the shift would go to 5 workdays at 10 hours each day. Gray said there was no reduction in the amount of work during the months before the layoff. Gray did not work overtime in the 3 weeks before the layoff.

Record documents illustrate that the second shift was working overtime up to the March 30 layoff. Three employees failed to work overtime in the week before the layoff but the remaining eight employees all worked overtime.

General Counsel contends that the second shift was selected for layoff on March 30 because of those employees' union activities. In support of that contention General Counsel pointed to evidence that Respondent believed that the second shift was heavily involved in union activities. David Threlkeld testified about a conversation he had with Superintendent T. J. Robbins at the mine on March 19 when after asking Threlkeld if Threlkeld had heard anything about organizing activities, Robbins told Threlkeld that he had heard that 70 percent of the second shift had already signed cards.

Tim McCoy testified that he was aware that the Union was trying to organize his employees from the summer of 1989 when the Union was picketing at Black Creek because of the Pittston strike. McCoy recalled there were 50 to 100 pickets in ''masks and paper sacks on their heads who would greet the morning shift as they would come to work and threaten and scare them.'' That picketing lasted for over 4 weeks ending at the end of July 1989. According to McCoy, over a third of the work force left because of intimidation and threats to their family and home. McCoy watched as union representatives talked to his employees and one UMW representative told McCoy that the Union's objective was to organize IMAC. The Union was, as understood by McCoy, focusing on nonunion operations like the Black Creek Mine.

Even after the Pittston strike ended McCoy was periodically told by employees that UMW was wanting to talk with them.

As shown above, Jerry Bickerton, William Earl Gray, David Threlkeld, Jerry Humphres, and Edward Fair were included in the March 30 layoff. All those employees were on Respondent's second shift at Black Creek, all testified in this hearing, and they all testified that they signed union cards.

President McCoy admitted that Respondent had not had a true layoff at Black Creek since it was opened in 1987 until the March 30, 1990 layoff.

Bickerton had never been laid off before March 30, 1989. He had worked for Respondent since March 1987.

David Threlkeld testified that he was phoned at his wife's business by Jack Maturo and told of the layoff. A few days after the layoff Threlkeld, along with the other second-shift employees that testified, received a registered letter from Respondent advising that he had been terminated.

Threlkeld phoned his ''boss,'' Larry Guthrie. Guthrie confirmed that he too had heard that Threlkeld had been passing out union cards but Guthrie told Threlkeld that he didn't think that was the reason for the layoff. Guthrie told Threlkeld that Threlkeld still had a job, and that the layoff was for economic reasons and lack of production on the night shift.

Jerry Humphres was notified by letter that he was being terminated.

Jerry Bickerton testified that when he talked to Jack Maturo some 2 weeks before Respondent laid off the second shift, Maturo asked Bickerton who was pushing the Union and Maturo asked Bickerton to help Respondent find out who was pushing the Union.

C. *The Refusal to Rehire*

Of the employees that were allegedly discriminatorily laid off from the second shift at Black Creek on March 30, there was evidence that only employees Jerry Bickerton, Titus Smith, Billy Linley, and Edward Fair were offered work after the layoff. Bickerton declined Respondent's offer. Although Edward Fair accepted Respondent's offer, General Counsel contends that Fair was not legally recalled.

Respondent contends that it mailed offers of reinstatement to the laid-off employees. Former employees William Gray, David Threlkeld, and Jerry Humphres testified that they were not contacted by mail or otherwise, and that they were not offered reinstatement. In line with my credibility findings, I credit that testimony. I find that credited evidence proved that those employees were never offered reinstatement following the March 30 layoff and the March 31 termination.

Respondent did offer reinstatement to Jerry Bickerton, Titus Smith, Charles Alexander, and Ed Fair. Respondent's records show that Billy Linley who is not alleged as a discriminatee, was reinstated in May 1990. Fair was put back to work but General Counsel contends that he was not legally reinstated. There is record evidence regarding that issue which will be considered. Bickerton declined Respondent's offer of reinstatement. As to Titus Smith and Charles Alexander there is uncontested evidence that both were offered reinstatement. Smith was offered work at Sumiton and he declined that job which was subsequently accepted by Ed Fair. Respondent wrote Titus Smith on June 8, 1990, confirming that Smith had told Jack Maturo that he was satisfied with his current employment.

Jerry Bickerton testified that Titus Smith told him that Maturo had called Smith and asked if Smith was interested in returning to work for Respondent. Smith told Maturo that the job being offered, which was that of running the crusher up at Sumiton, was too dusty and he declined to return on that job. Before the layoff Titus Smith ran the coal loader on the second shift at Black Creek.

On June 14, Respondent wrote Charles Alexander advising that employment was available with Respondent.

I credit the above-mentioned uncontested evidence. I do not credit evidence showing that letters of reinstatement were written to Threlkeld, Gray, and Humphres. As shown above, I credit their testimony to the contrary.

In view of the complaint allegation that Respondent engaged in a separate violation by refusing to recall six employees, I must consider that question regardless of whether

it is found that Respondent engaged in illegal activity by laying off or terminating the employees.

Titus Smith and Charles Alexander did not testify. General Counsel failed to show they were not offered reinstatement and the uncontested evidence proved that the two of them were contacted by Respondent regarding reinstatement.

General Counsel argued that neither Smith nor Alexander were offered comparable work. However, the record does not prove that Respondent's offer was insufficient. Unlike the situation with Edward Fair, there was no showing of how Titus Smith's job before the layoff compared with the job offered him at Sumiton—i.e., the jobs of coal loader and crusher.

As to Alexander, he did not appear pursuant to General Counsel's subpoena and the record does not dispute evidence offered by Respondent. The record shows that Alexander was written and advised of employment availability with Respondent on June 14, 1990.

In view of the full record I recommend that the refusal to reinstate allegations be dismissed as to Smith and Alexander.

The record included evidence regarding the availability of work after the March 30 layoff. Record documents proved that Respondent lost employees after the layoff in jobs similar to those held by laid-off employees on April 2, May 14, June 4, and 24, July 30, on an unspecified date in August, and September 10, 1990. Jack Maturo and Tim McCoy testified that beginning in May 1990 Respondent employed contractors to perform work generated through its permit revision efforts. Additionally, as shown above, Respondent had additional jobs in other locations including the job at Sumiton which was filled by recalling Ed Fair on June 9, 1990.

Respondent contends, as shown above, due to the problem created by uncovering old mine works it was necessary for it to mine some other areas. Tim McCoy applied for a permit revision with the Alabama Surface Mining Commission which would allow Respondent to mine in other more productive areas than the one mined at the time of the layoff. According to McCoy he was able to apply for a permit in an increment of the Black Creek area where he had a lease and to also seek to lease some other land. McCoy testified that the permit revision came through in May 1990 and he was able to resume second-shift operations. He estimated that he was able to start up those operations around mid-June.

McCoy said that he tried to contact the laid-off employees but was successful in recalling only some of those employees.

Respondent is using contract companies to man some of the jobs because, according to McCoy, the new permit areas will not provide enough mining time to justify an additional investment in equipment. That area will not last over a year according to McCoy. The contract companies' employees are rock truckdrivers. Additionally McCoy testified that some of the rock truckdrivers are Respondent's employees but he did not know from memory, how many current rock truckdrivers are his own employees. McCoy estimated when he testified on November 19, 1990, that four or five of the employees on the second shift were employees of Respondent as opposed to employees of one of the contract companies. He estimated that the total number of employees on the second shift is 9 or 10.

Additionally, Respondent provides two or three service contract employees at Sumiton, Alabama, to do crushing and loading for Continental Energy and Respondent operates a mine at Natural Bridge, Alabama, where it employs another 10 to 12 employees according to McCoy.

Jerry Bickerton, one of the laid-off second-shift employees at Black Creek, was contacted by Jack Maturo on May 25, 1990, and asked if he was ready to go back to work. Bickerton told Maturo that he had another job and was not interested in returning to Respondent at that time.

Although Respondent offered evidence that it contacted Bickerton by mail confirming that he did not desire reinstatement, Bickerton testified that he never received a letter from Respondent regarding recall. The May 25 conversation with Maturo was his only contact with Respondent about going back to work.

General Counsel does not allege that Respondent illegally failed to recall Bickerton.

During their May 25 conversation Jack Maturo asked Jerry Bickerton to have Eddie Fair contact Maturo.

Eddie Fair was the Union's observer during the April 27, 1990 election.

Fair was put back to work by Respondent at Sumiton, Alabama, on June 9. When Fair phoned Jack Maturo after being contacted by Jerry Bickerton who is a neighbor of Fair, Maturo told Fair he would get back to him after checking with some other employees. Maturo again contacted Fair through Bickerton. Fair did not have a phone. Maturo said that Titus Smith had accepted the job and that Fair would not be needed then. Later, again through Bickerton, Fair was called by Maturo and put to work at Sumiton. Maturo told Fair that Titus Smith had turned the job down because it was too dirty.

General Counsel contends that Fair was never properly reinstated. Fair worked for 6 weeks at Sumiton on the crusher and driving the semi. Although he had previously worked 60 hours a week before the layoff, he was scheduled to work only four 10-hour days each week while on the night shift at Sumiton and, according to Fair, he never did work a full 40-hour week. The Sumiton job was held by Fair from June 9 to July 21, 1990. On July 21, Fair was transferred to driving a rock truck at Black Creek on the day shift. Jack Maturo told Fair that Respondent had acquired some more rock trucks. Fair asked both T. J. Robbins and Maturo to be placed on the night shift but that request was refused. After Fair was back at Black Creek for a week another rock truckdriver, Brockway, requested night shift and was transferred to night shift.

Jerry Humphres testified that he has not been contacted about going back to work. Humphres' phone was disconnected shortly after the layoff but he has retained the same address. He was advised of his termination by letter at that address.

William Gray was laid off with the other second-shift employees on March 30. Gray testified that Respondent has not phoned or written him regarding a recall to work since his layoff. Although Gray was notified that he had been terminated by certified mail and his mailing address has not changed, he has received nothing in the mail regarding recall.

Gray was told by the NLRB investigator that Respondent's files showed they had tried to contact Gray regarding going

back to work. Gray admitted that he did not contact Respondent to determine if they wanted him to return to work.

According to Gray he is both qualified and willing to perform any of Respondent's jobs.

David Threlkeld testified that he has not been contacted by Respondent, and Threlkeld did not initiate contact with Respondent, regarding recall. When shown a letter addressed to him dated July 26, 1990, stating that Respondent had job openings, Threlkeld denied that he had received the letter.

General Counsel called Rodney Barton who testified that he was hired to work for Respondent at the Natural Bridge Mine after talking with T. J.

Barton testified that he was employed by Mega Services to work for Respondent at their Natural Bridge Mine during July 1990 as a bulldozer operator on the second shift. Barton talked to T. J. in Respondent's management about his pay. T. J. told Barton that he would be paid in cash.

Barton also testified that during a conversation at work, Barton's brother asked T. J. about rehiring David Threlkeld:

> T. J. said he wasn't really sure how that was gonna happen because they was still all tied up in the hearings and what have you.
>
> And then they got to talking. It was real funny, too. They said they was gonna offer [David Threlkeld] a job back, and my brother told him, he said, ''Well, you need to get whatever you're gonna put him on in tip-top shape.'' And [T. J.] said, yeah, he would do that, but he was gonna put more on him than he could stand regardless.

Barton testified on cross-examination that his prehearing affidavit included the following:

> I asked T. J. how long it would be before I could get on the payroll. T. J. said: ''When the lawsuit's over with and we offer the people their jobs back. Most of them are not accepting them. We've got to offer David [Threlkeld] a job. It's gonna be on a rock truck.''

Barton admitted that nothing was said about David Threlkeld's union activities during his conversations with T. J.

On direct examination, Barton testified that after he inquired about overtime pay T. J. got back to him and told him that they could not pay overtime for the time Barton put in over 40 hours a week.

On cross-examination Barton admitted that his prehearing affidavit indicated that he asked T. J. for more money and that T. J. refused to give him a raise in pay. Barton quit the job on being told his pay would not be increased.

T. J. Robbins admitted that Barton quit after he told Barton that his pay would not be increased.

Findings: The record shows that the second shift was laid off on March 30; some, if not all, those second-shift employees were terminated by letters dated March 31, 1990; and several of those employees credibly testified that they were never contacted by Respondent regarding returning to work.

The evidence shows that Respondent was opposed to the union organizing activities and Respondent demonstrated antiunion animus through 8(a)(1) activity. Threats made by Respondent, as shown above, included a threat to rid itself of the employees that signed union cards by closing and reopening the mine. I find that General Counsel proved prima facie that the union campaign contributed to Respondent's decision to lay off employees on March 30 and to terminate them on March 31, 1990.

That evidence supporting a prima facie case includes a showing that Respondent terminated some, if not all, its second-shift employees immediately after the layoff shortly after it heard that 70 percent of those employees had signed union cards; Respondent gave shifting reasons for the layoff as shown during testimony of Timothy McCoy showing at one point that the layoff was necessitated because of low production due to an underground mined area and high overburden, and at another point showing that there was enough coal to mine but the second shift was falling down on the job; and Respondent granted its employees a raise in pay of 25 cents an hour and more, during early March 1990, at a time when the figures showed production had already dropped and according to their own testimony, both Tim McCoy and Jack Maturo were aware of poor production by the second shift at the time of the pay increase.

The above evidence supports the finding of a prima facie case in support of the complaint allegations. Those same factors also support a finding that the asserted bases for the layoff were pretextual. Although several of the factors pointed to by Respondent are factually correct, the record shows the bases may nevertheless be pretextual as grounds for Respondent's actions against the second shift.

In that regard, at one time during his testimony Tim McCoy testified that he decided to lay off the second shift even though there was sufficient coal to mine, because the second shift was taking long breaks, they were working through breaks in order to leave work early, and they were not being as productive as the first shift.

However, the record failed to show that the second shift, and particularly the leadman over the second shift, was ever informed that the second shift was not producing as much coal as the first shift. Bickerton agreed that normally the second shift should produce more than the first shift because the first shift has more nonproductive duties.

Additionally, the decision makers for Respondent disagreed over the timetable on the layoff decision. Superintendent Robbins testified that he met with Tim McCoy and decided on the layoff about the first of March. Robbins recalled they decided to lay off the second shift at that time ''because they was not performing and it was costing [McCoy] money.'' Tim McCoy testified that the decision to lay off the second shift was made a few days before March 30. Jack Maturo recalled the decision was made on March 29 when he, McCoy, and Robbins met and went over production and pit advancement records.

Respondent granted its employees a pay increase of 25 cents an hour and more, in early March 1990. Four employees including Joe Fuller who worked on the first shift, received pay increases of 25 cents per hour. Some employees received increases of $1 per hour and some received increases of 50 cents per hour.

At the time of the pay increase Respondent had figures from T. J. Robbins showing that the second shift was not moving as much overburden as the first shift; Respondent knew that production had decreased from 14,364 tons in January to 11,875 in February; Respondent had discovered through exploratory drill holes 1 month before reaching pre-

viously mined areas that it was getting into an extensive area of previous underground mines; and Respondent had decided that it was necessary to seek permit revisions and new leases due to its difficulty in producing coal.

Additionally, the evidence which I credit shows that the laid-off employees were regularly working overtime each week until March 30.

Moreover, despite the evidence showing that Respondent was aware that it was entering a previously mined area some 30 days before it reached that area, despite its knowledge of the high overburden wall on the other side of the pit, and despite its alleged knowledge about the slackness of the second shift several days or weeks before March 30, the evidence shows that layoff was called on a Friday morning during a pay period. The employees were not notified at the end of their prior shift. Instead on the morning before they were to report that afternoon, Respondent phoned to advise of the layoff. That evidence tends to show that the decision to lay off on March 30 was a sudden decision.

The above evidence which tends to show that Respondent's asserted bases for its actions were pretextual, also calls into question the issue of whether Respondent would have acted in the absence of protected activities. The record does include some support for Respondent's contention there was business justification for the layoff. The production at Black Creek had dropped before the layoff. Respondent had uncovered a previously mined area which resulted in it mining less coal and it had to uncover a substantial overburden to reach some of the coal.

However, Respondent did not stop with a layoff. On the following day it sent notices of termination to at least five of the laid-off employees[1] and the laid-off employees were not recalled when Respondent first had openings available. Three of the laid-off employees including David Threlkeld who, along with Joe Fuller, were the two employees most involved with the Union, were never recalled.

The evidence shows that Respondent was aware of its employees increased union activities in mid-March 1990. It was also aware on March 19 that 70 percent of the second shift had signed union cards. Eight employees in a 25-person unit was enough to support a petition for an election. Laid-off employees with a reasonable expectation of recall, are entitled to vote in an NLRB election. Terminated employees, who of course, have no expectation of recall, are not entitled to vote in an NLRB election. See, for example, *Apex Paper Box Co*., 302 NLRB 67 (1991).

The evidence mentioned above especially that involving the timing of the layoff coming shortly after Respondent learned that the bulk of the union activity was on the second shift, tends to illustrate that those grounds which had existed for several weeks before March 30 were used as a pretext to justify the layoff. Moreover, there was no showing of any business basis for the March 31 discharge of the second-shift employees.

Respondent was supported in its argument that the second shift was not as productive as the first shift. However, the testimony of T. J. Robbins illustrated that there was a long history of the second shift being less productive. Robbins testified that he was promoted to leadman on the second shift around August 1987 because of the lack of productivity of the second shift.

Additionally, there was evidence illustrating that Respondent did not follow established practice of dealing with low production on the second shift.

During most of the second shift there was not a supervisor present. Instead the second shift was directed by leadmen. As shown above, Respondent had, in the past, replaced its second-shift leadman due to low production. Here, in March 1990, Respondent took a different course. Eight of the eleven employees were laid off and the shift was shut down.

Moreover the evidence failed to show that Respondent had anything other than an unlawful motivation in failing to recall Threlkeld, Humphres, and Gray. I credit the testimony showing that none of those employees were contacted by mail or otherwise regarding reemployment. The record established that Respondent had openings including openings manned by employees of contract companies, that could have been manned by the alleged discriminatees.

The testimony of Rodney Barton demonstrated that despite the fact that he was employed by a contractor of Respondent, he was actually hired and supervised by T. J. Robbins. Both Barton's and Robbins' testimony illustrated that point. Although Tim McCoy testified that he used contract employers because the expected duration of the expanded mining areas was no more than a year, the record illustrated that leased equipment was operated by both employees of Respondent and contractors. Therefore, the record did not support McCoy's contention that he avoided the cost of purchasing new equipment by using contract employers.

Additionally, as shown above, the record illustrated that Respondent exercised control over all the jobs available at its operations at Sumiton, Black Creek, and Natural Bridge. Regardless of whether the job was manned by a contract employee or an employee of Respondent, the record illustrated that Respondent retained the authority to employ someone of its own choosing to fill that job. Laid-off employees could have been reinstated to either contract employer positions or positions on Respondent's payroll.

The record indicated that all the jobs could have been filled by laid-off employees if Respondent, through its superintendent, had elected to rehire those employees.

Respondent offered no credible justification for its failure to recall Threlkeld, Gray, and Humphres. Jack Maturo testified that he would have offered employment to Threlkeld if Threlkeld had spoken to him when they met at a convenience store during July 1990. I do not credit that testimony which conflicted with the testimony of Threlkeld.

In view of the record, I find that Respondent was motivated in refusing to rehire Threlkeld, Humphres, and Gray because of protected activities.

The testimony of Rodney Barton showing that T. J. Robbins expressed an intent to put more on Threlkeld than he could handle if Threlkeld was recalled, further illustrates Respondent's illegal motive in refusing to recall the alleged discriminatees.

Respondent failed to show that it would have refused to rehire those employees in the absence of protected activities. As shown above, I credit the evidence showing that Respondent did not contact those employees regarding reemployment. I discredit the testimony of Tim McCoy that he

[1] The evidence illustrated only that those employees that testified in this matter received letters of termination. However, there was no evidence showing that other laid-off employees did not receive similar letters.

mailed letters to them advising of job opportunities. The record illustrated that Respondent possessed valid, current information regarding the employees' mailing addresses but that Respondent failed to contact them. In fact Respondent had mailed registered or certified letters of termination to those same employees at their existing addresses on March 31, 1990.

I find that the record illustrated that Respondent was motivated by its employees protected activities in laying off David Threlkeld, Jerry Bickerton, Titus Smith, Charles Alexander, Jerry Humphres, William Gray, and Ed Fair, and in its refusal to reinstate Threlkeld, Humphres, and Gray. The record also shows that Respondent failed to prove that it would have laid off Threlkeld, Bickerton, Smith, Alexander, Humphres, Gray, and Fair, and refused to reinstate Threlkeld, Humphres, and Gray, in the absence of protected activities. (*Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); *Delta Gas, Inc*., 283 NLRB 391 (1987), enfd. 840 F.2d 309 (5th Cir. 1988); *Southwire Co. v. NLRB*, 820 F.2d 453 (D.C. Cir. 1987); *Superior Coal Co*., 295 NLRB 439 (1989); *Dorothy Shamrock Coal Co*., 279 NLRB 1298 (1986); *GSX Corp. of Missouri*, 295 NLRB 529 (1989); *T & H Investments*, 291 NLRB 409 (1988)).

As to the question of Edward Fair's reinstatement. The credited evidence shows that when Respondent recalled Fair after the March layoff, it originally placed Fair on the crusher job at Sumiton on June 9, 1990. At that time other employees were occupying the same job formerly held by Fair at Black Creek. That was the job of rock truckdriver. Before the layoff Fair regularly worked overtime. At Sumiton, Fair did not work a full 40 hours on any of the weeks he was assigned to that job. When Fair was transferred to Black Creek on July 21, 1990, he was assigned to first shift despite his expressed preference for the second shift.

Although Respondent admitted that Fair was a good rock truckdriver before the layoff, he was discharged allegedly because he was not giving 100 percent after he was reemployed.

As shown above, it was Respondent's policy to warn its employees at least three times before discharge. However, the man that directed Fair's work after he was reemployed at Black Creek, Bruce Cornelius, was able to recall only one occasion in which he reprimanded Fair. On that occasion Fair failed to perform routine maintenance and to advise Respondent that his truck needed repair while the operations were shut down.

At the time of his discharge, Respondent was aware that Fair had been the union observer during the April 27, 1990 election. The evidence shows that Fair was never reinstated to the same position he held before the layoff even thought that position was available at times after the March 30 layoff. Fair was placed on jobs other than his former position under working conditions that did not measure up to the conditions he worked under prior to the layoff and termination. His March 1990 layoff and termination were discriminatorily motivated and Respondent failed to show it would have taken those actions against Fair absent its employees' protected activities. Similarly the record illustrated that Fair was discriminatorily treated after being reemployed and Respondent failed to show that it would have treated Fair in that fashion, in the absence of protected activities. (*Wright Line*, supra; *NLRB v. Transportation Management Corp*., supra; *Delta Gas*, supra; *Southwire Co. v. NLRB*, supra).

I find that Respondent failed to reinstate Fair to his former position and that his former position was available at the time Fair was reemployed. Respondent failed to retain Fair as an employee on a nondiscriminatory basis. Therefore I find in agreement with General Counsel that Respondent failed to properly reinstate Edward Fair. *Deauville Hotel*, 256 NLRB 561 (1981).

CONCLUSIONS OF LAW

1. IMAC Energy is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. United Mine Workers of America is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent, by interrogating its employees about their union activities; by telling its employee that an employee had been discharged because of his union activities; by threatening to close it mine because of its employees' union activities; by soliciting its employees to assist it in learning the names of those employees supporting the Union; by threatening to discharge its employees because of their union activities; by telling its employees that it preferred that they quit if they support the Union; and by threatening its employees that it would be futile for them to select the Union as their bargaining representative, has violated Section 8(a)(1) of the Act.
4. Respondent, by discharging its employee Joe Fuller; by laying off employees David Threlkeld, Jerry Bickerton, Titus Smith, Charles Alexander, Jerry Humphres, William Gray, and Ed Fair; by terminating the employment of David Threlkeld, Jerry Bickerton, William Gray, Jerry Humphres, and Ed Fair; and by refusing to reinstate David Threlkeld, William Gray, Jerry Humphres, and Ed Fair, because of its employees' activities on behalf of United Mine Workers of America, has violated Section 8(a)(1) and (3) of the Act.
5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent has illegally laid off, discharged, and refused to rehire its employees in violation of sections of the Act, I shall order Respondent to offer David Threlkeld, Jerry Humphres, William Gray, Ed Fair, and Joe Fuller, immediate and full reinstatement to their former positions, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges. I further order Respondent to make Threlkeld, Humphres, Gray, Fair, Fuller, Jerry Bickerton, Titus Smith, and Charles Alexander whole for any loss of earnings they suffered as a result of the discrimination against them and that Respondent remove from its records any reference to the unlawful actions against its employees and notify each of those employees in writing that

Respondent's unlawful conduct will not be used as a basis for further personnel action. Backpay shall be computed as described in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, IMAC Energy, Brilliant, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees about their union activities; telling its employees that an employee had been discharged because of his union activities; threatening to close it mine because of its employees' union activities; soliciting its employees to assist it in learning the names of those employees supporting the Union; threatening to discharge its employees because of their union activities; telling its employees that it prefers they quit their job if they support the Union; and threatening its employes that it would be futile for them to select the Union as their bargaining representative.

(b) Laying off, discharging, and refusing to rehire its employees because of their protected activities.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Joe Fuller, David Threlkeld, Jerry Humphres, William Gray, and Ed Fair immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make Fuller, Threlkeld, Humphres, Gray, Fair, Jerry Bickerton, Titus Smith, and Charles Alexander whole for any loss of earnings plus interest, they suffered by reason of its illegal actions.

(b) Rescind its layoff, discharge, and refusal to rehire, as the case may be, of employees Joe Fuller, David Threlkeld, Jerry Bickerton, Jerry Humphres, Titus Smith, Charles Alexander, William Gray, and Ed Fair, and remove from its files any reference to its illegal actions and notify each of those employees in writing that this has been done and that evidence of its unlawful actions will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, and timecards, personnel records, reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Brilliant, Alabama, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees about their activities on behalf of United Mine Workers of America or any other labor organization.

WE WILL NOT tell our employees that we have discharged an employee because of his union activities.

WE WILL NOT threaten our employees with closing our mines because of our employees' union activities.

WE WILL NOT threaten our employees with discharge because of our employees' support for the Union.

WE WILL NOT solicit our employees to assist us in learning the names of employees that support the United Mine Workers of America or any other labor organization.

WE WILL NOT threaten our employees that it will be futile for them to select the Union as their collective-bargaining representative.

WE WILL NOT threaten our employees that we prefer that they quit if they support the Union.

WE WILL NOT lay off, discharge, or refuse to rehire our employees because they engage in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL offer immediate and full reinstatement to David Threlkeld, Jerry Humphres, Joe Fuller, William Gray, and Ed Fair to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges.

WE WILL make David Threlkeld, Jerry Bickerton, Jerry Humphres, Joe Fuller, Titus Smith, Charles Alexander, William Gray, and Ed Fair, whole for any loss of earnings they suffered by reason of our discrimination against them with interest.

WE WILL rescind our actions found illegal, against Fuller, Threlkeld, Bickerton, Smith, Alexander, Humphres, Gray, and Fair, because of their protected activities.

WE WILL notify Fuller, Threlkeld, Bickerton, Smith, Alexander, Humphres, Gray, and Fair, in writing, that we have rescinded the actions found illegal and that we will not use those actions against them in any manner.

IMAC ENERGY